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NO.

# in the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR.,
*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent.*

## APPENDIX

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## APPENDIX A

[FILED AUG 12, 1980]

[RECEIVED AUG 28 1980]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. CR-79-170-WAI(SJ)

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

JOSEPH C. BONANNO, SR., and JACK DIFILIPPI,
*Defendants.*

## MEMORANDUM OF DECISION

The Court has carefully reviewed the evidence, both testimonial and documentary, and has considered the argument of counsel, and now finds:

(1) The defendants, JOSEPH C. BONNANO, SR. and JACK DIFILIPPI, and each of them, are GUILTY of the offense charged in Count 1 of the Indictment on file herein;

(2) The defendant JACK DIFILIPPI is GUILTY of the offense charged in Count 2 of the Indictment on file herein;

(3) The defendant JACK DIFILIPPI is NOT GUILTY of the offense charged in Count 3 of the Indictment on file herein;

(4) The defendant JACK DIFILIPPI is GUILTY of the offense charged in Count 4 of the Indictment on file herein;

(5) The defendant JACK DIFILIPPI is GUILTY of the offense charged in Count 5 of the Indictment on file herein;

(6) The offense charged in Count 6 is redundant and duplicative of the offense charged in Count 5 and is DISMISSED on that ground.

(7) The defendant JACK DIFILIPPI is NOT GUILTY of the offense charged in Count 7 of the Indictment on file herein.

## I.

## CONSPIRACY

The record has been examined to determine whether it discloses, beyond reasonable doubt, a knowing and willful agreement to corruptly influence, intimidate or impede a witness before the Grand Jury or an agreement to endeavor to corruptly obstruct, influence or impede the due administration of justice together with proof beyond reasonable doubt of the execution of at least one alleged overt act.

I conclude that the Government has shown, beyond reasonable doubt, these necessary elements.

The record is replete with the language of agreement between defendants to influence witnesses. Examples are:

Ex. 49-1 pp. 22-27. This exhibit shows a detailed plan with respect to the most advantageous line of testimony to be given by Karen Bonanno and her father, Ted Anderson, on the subject of an approximately $6,000.00 loan, ostensibly made by Anderson to his daughter. Defendant BONANNO stated to DIFILIPPI on p. 23 of Ex. 49-1:

> "I told her, 'Don't be afraid that later I will give it to you."

Thus, the loan was to be in fact repaid by BONANNO, and it was the object of defendant BONANNO to keep the facts of this transaction from the Grand Jury. If the fact of his agreement to repay should become known BONANNO felt that it would be to his disadvantage:

> "This would sink us, this would sink me even more." Ex. 49-1, p. 23

After being enjoined to speak to Anderson with respect to the transaction – Ex. 49-1, p. 26:

> "Or else, but . . . if you see him, you talk to him, you tell him. That he controls . . . Because, to the big guy, they told him precisely this."

Following further discussion defendant DIFILIPPI said, at Ex. 49-1, p. 27:

> "But, anyway, I'll see to it tomorrow morning. Now you, you when one. . . ."

And, further at p. 27, the following colloquy with respect to Karen Bonanno:

BONANNO: "I can't say these things to her. You have to tell her."

DIFILIPPI: "No, I'll tell her, I'll tell her, I'll tell her, I'll tell her."

With further reference to the appearance of Ted Anderson before the Grand Jury, Ex. 95-1 is as follows, at p. 18:

DIFILIPPI: "And I told her the discussion that I had to tell her, and I told her 'Don't tell him tonight in case he forgets it. Tell him tomorrow morning when you're both in the car,' I told her."

And further at the same page:

DIFILIPPI: "And this is how we remained. Therefore, tomorrow morning, when I see her I'll ask if he, is his memory was refreshed, and everything."

And further at pp. 18 and 19:

DIFILIPPI: "Yeah, okay. But if she, if he if he . . . But, or else I'll tell him sternly, . . . me personally, also, if, he has to go . . . ah, ah, I mean 'You've got to do this'."

BONANNO: "And to, to who?"

DIFILIPPI: "To the little girl's father."

BONANNO: "Yeah."

DIFILIPPI: "To the 'little one's' wife."

BONANNO: "But he, that, that you have to tell her to tell her father?"

DIFILIPPI: "No, I told her to tell her father."

BONANNO: "Yeah."

DIFILIPPI: "Because I still haven't seen the father."

BONANNO: "Yeah."

DIFILIPPI: "Now, tomorrow morning I'll see him."

BONANNO: "Yeah."

DIFILIPPI: "And before he appears before 'the Mollica'."

BONANNO: "Yeah."

DIFILIPPI: ". . . I'll also tell him."

BONANNO: "It's understood."

DIFILIPPI: "That's all. And whatever happens, happens."

And further at p. 24:

BONANNO: "All right, speak with the father of what's her name."

DIFILIPPI: "Okay."

BONANNO: "All right?"

DIFILIPPI: "Okay."

These excerpts illustrate the basic agreement and understanding between the defendants that prospective witnesses be briefed in advance of their testimony.

While there is little apparent queston as to whether the plan to program witnesses was willful and knowing on the part of the defendant BONANNO, any doubt which may exist is pretty well removed by the testimony of defendant DIFILIPPI reported at 30 RT 2885, lns. 21-14:

> Q. "But you understood from these discussions with Mr. Bonanno that he wanted you to talk with these witnesses and have them testify in a certain way?"
>
> A. "Yeah. Yeah."

While MR. DIFILIPPI testified that his apparent agreement to speak with witnesses was made for the sole purpose of mollifying defendant BONANNO (30 RT 2887 lns. 14-17):

> Q. "All right. And the way you misled him was to make him think that you were going to talk to these witnesses when actually . . ."
>
> A. "To make him happy."

This claimed purpose is belied by MR. DIFILIPPI'S conduct in his discussions of the prospective testimony of witness Peters before the Grand Jury. If it can arguably be said that DIFILIPPI might have had a reason to humor and cajole BONANNO, he certainly had no reason to do the same with Peters. In Ex. 112-1, p. 23, DIFILIPPI and Peters discuss an appropriate hiding place for the records of the car transaction purportedly removed by Peters from the books of his agency. In Ex. 112-1, pp. 28-31 Peters and DIFILIPPI discuss a format of testimony designed to explain the February 15, 1979 call by Peters to BONANNO. These conversations are strong evidence of the specific intent of DIFILIPPI to fully participate in the planning of inaccurate or false testimony. This conduct on the part of DIFILIPPI is wholly inconsistent with his claim that his apparent language of acquiesence to BONANNO'S requests that he talk to prospective witnesses was the product of his solicitude for an aging, sick and perhaps senile relative.

In the course of his testimony at the trial, (see, 30 RT 2807, ln. 14—2808, ln. 3) DIFILIPPI explains his suggestion with respect to the hiding of the purportedly abstracted records on the basis of a suspicion which he entertained concerning the motivation of Peters. In the same volume, p. 2809, ln. 3—2810, ln. 2, DIFILIPPI'S assistance to Peters in the hiding of the purported records is explained on a similar basis.

In order to accept such an explanation of that conduct and the explanations given by DIFILIPPI as to the several agreements on his part to speak to witnesses the Court would have to conclude that these men never meant what they said and what they did was not what it seemed to be. Counsel for defendant

BONANNO acknowledged as much when he stated in argument:

> "Your Honor, how can these notes or conversations be accepted at face value? We have clear empirical proof—empirical proof—that what these people are saying to one another is not necessarily what they mean." (32 RT 3112, lns. 1-4)

The Court is asked to find a reasonable doubt on the basis that BONANNO and DIFILIPPI tried to manipulate each other and that DIFILIPPI tried to manipulate Peters for purposes other than those alleged in the Indictment. The clear purport of words and acts belie the argument.

It is contended on the basis of the DiFilippi-Peters conversations of February 22 and 23, 1979, that DIFILIPPI did not know prior to Peters' purported February 22 appearance before the Grand Jury of the Bonanno-Peters call of February 15, 1979. Therefore it is argued that DIFILIPPI, not knowing, was no conspirator, did not criminally agree, and that the Peters episode is therefore without probative value in support of the Government's case on the issue of conspiracy.

The conversation of February 22, 1979, Ex. 108-1, on pp. 4-7, includes a discussion of Peters' scheduled appearance before the Grand Jury. There DIFILIPPI states, pp. 5 and 6, in substance, that those who advise prospective witnesses with respect to testimony may incur criminal culpability. He states at p. 6 that Peters should talk, and not speculate, with respect to anything that took place between Peters and the Bonanno sons. At pp. 11 and 12 the telephone call of February 15,

1979, is discussed. At p. 28 DIFILIPPI tells Peters not to call BONANNO any further. From these passages an inference may be drawn that there had been no communication between defendants concerning the telephone conversation of February 15.

The conversation of February 23, 1979, is defendant Difilippi's Ex. H. On pp. 16 and 17, there is a discussion of Peters' February 22 Grand Jury appearance, in the course of which DIFILIPPI indicates that the Grand Jury's request of Peters for transaction records involving the BONANNO sons is no problem because Peters has them. An inference against DIFILIPPI'S knowledge of the February 15 phone conversation can be strongly drawn from that passage.

The problem with the argument is created very forcefully by Ex. 111-1, p. 109, which is a part of a recorded conversation which occurred on February 26, 1979. In neither Ex. 108-1 nor DIFILIPPI Ex. H is there any affirmation or denial of the telephone conversation of February 15. The parts of the conversations in those exhibits which have been referred to are simply not consistent with knowledge by DIFILIPPI of the February 15 phone call. But in Ex. 111-1 there is a clear affirmation of actual knowledge on the part of DIFILIPPI. (p. 109) The words referred to were spoken after DIFILIPPI asked that the radio be turned on as follows:

> DIFILIPPI: "Put the thing on. Over there . . . You know, he is waiting for my call before he calls you."
>
> PETERS: "He, he's waiting for . . . ."

DIFILIPPI: "After you called him, he called me. And he says to me, he says, uh, he has been calling. I says, you know I can't talk on this fucking phone."

PETERS: "But I didn't talk to him at his, his house. Okay, okay.

DIFILIPPI: "You know that but you see he had to go out and use a pay phone to talk to you, to the dealership. He could not talk from his house."

PETERS: "Yeah, okay. Then he, he called you after he called me? I mean after I called him."

DIFILIPPI: "Right, right."

DIFILIPPI then goes on to accurately summarize the conversation of February 15 and provides an explanation which, if believed, pretty well destroys the inferences referred to arising from Ex. 108-1 and DiFilippi H.

In sum, the Peters episode leaves no room for reasonable doubt as to the intent of both defendants or *as to conspiratorial activity.*

Both defendants urge that the conduct employed by Peters with the apparent blessing of the Government is so reprehensible as to rise to the level of affirmative governmental misconduct. I do not find it so, undercover work is inherantly a dirty business in some respects. It may be that innocent persons who were approached as possible investors in the Barchetta transaction were financially and personally taken advantage of to some extent. If they were, this can hardly be raised in defense by defendants herein.

Because of the means of memorialization the Peters incident speaks clearly for itself, as far as the issues in this case are concerned.

Without proceeding exhaustively to quote exhibits further, the following excerpt citations are illustrative of conversations between the defendants tending to show spoken agreement to influence witnesses:

> Ex. 39-1, pp. 19, 23, 31; Ex. 48-1 pp. 7, 8, 41-43; Ex. 49-1 pp. 19-27; Ex. 52-1 pp. 34, 36, 37; Ex. 95-1, p. 27.

I find that defendant BONANNO was not senile. There is no competent evidence to that effect. There is no competent evidence that he was at the time and place in issue incapable of forming and entertaining the requisite degree of intent.

On the basis of all the evidence in this case, including those several items hereinabove referred to I find that, beyond reasonable doubt defendants BONANNO and DIFILIPPI are GUILTY of the offense charged in Count 1 in that they and each of them conspired to endeavor to influence witnesses before the Grand Jury to give false testimony and to withhold evidence concerning the nature and source of assets of the businesses under investigation, evidence as to assets and income of individuals associated with the business under investigation, to falsely deny to the Grand Jury communications between the defendants concerning the Grand Jury investigation or concerning other witnesses before the Grand Jury, and to endeavor to influence witnesses to falsely deny defendants' corrupt efforts to influence them.

In furtherance of the purposes and objectives of the said conspiracy, beyond a reasonable doubt each of the following overt acts were committed by one or more of said defendants:

A-E, F, M, N (in respect to Count 2 only), O, Q, R. T, U, V, W (as to Counts 4 and 5 only).

## II.

## PERJURY

Defendant DIFILIPPI is NOT GUILTY of the offense charged in Count 3 because there is a reasonable doubt as to whether he swore falsely.

Defendant DIFILIPPI is NOT GUILTY of the offense charged in Count 7 because there is a reasonable doubt as to whether he swore falsely.

Count 6 of the Indictment is redundant and duplicative of Count 5 and essentially asks the same question concerning the same subject matter as does Count 5. Count 6 is therefore dismissed on that ground.

Defendant DIFILIPPI is GUILTY of the offenses charged in Counts 2, 4 and 5 of the Indictment.

Anger and frustration do not negate knowing and willful conduct, and no authority is cited to the contrary. In any event, DIFILIPPI has stated that he was offered an opportunity to recant or change false testimony and did not. Ex. 39-1, p. 14.

**The testimony sought was relevant and material to one aspect of the Grand Jury's investigation and the knowingly false answers tended to impede that aspect of the investigation. (1 TR 20, lns. 19-24).**

**Dated:**

**WILLIAM A. INGRAM**

**WILLIAM A. INGRAM**
**United States District Judge**

## APPENDIX B

[FILED DEC 9 1981]

[RECEIVED DEC 14 1981]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-1020/1021

UNITED STATES OF AMERICA,
*Plaintiff/Appellant*

*vs.*

JOSEPH C. BONANNO, SR. and JACK DIFILIPPI
*Defendants/Appellee*

Appeal from the United States District Court
for the Northern District of California,
Hon. William A. Ingram, presiding

Argued and Submitted September 17, 1981

Before: TANG and ALARCON, Circuit Judges, and KELLAM,* District Judge

### ORDER

Upon its own motion, the court remands this matter for 21 days to the district court for the limited purpose

*Hon. Richard B. Kellam, United States District Judge, Eastern District of Virginia, sitting by designation.

of making specific findings as to the basis for the court's judgment that defendants DiFillipi and Bonanno were guilty of conspiracy to obstruct justice. In particular, the district court is requested to make an express finding as to whether there was sufficient evidence, beyond a reasonable doubt, of the defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash. For the purpose of making these findings, the district court shall conduct a hearing to consider additional argument on this limited issue.

The parties may file supplemental briefs addressing this issue within 14 days of any finding made by the district court pursuant to this order of limited remand.

Upon receipt of the court's findings and any supplemental briefs submitted by the parties, this matter will be resubmitted to this panel for decision.

## APPENDIX C

[FILED JAN 11 1982]

[RECEIVED JAN 13 1982]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NOS. 81-1020/1021
USDC CR-79-170-WAI(SJ)

UNITED STATES OF AMERICA,
*Plaintiff/Appellant,*

v.

JOSEPH C. BONANNO, SR. and JACK DIFILIPPI,
*Defendants/Appellee.*

## DECISION

This matter comes before the Court on limited remand from the United States Court of Appeals for the Ninth Circuit, for the purpose of the making of findings in accordance with the following direction of the Court of Appeals:

> "In particular, the district court is requested to make an express finding as to whether there was sufficient evidence, beyond a reasonable doubt, of the defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash. For the purpose of making these findings, the district court

shall conduct a hearing to consider additional argument on this limited issue."

Pursuant to the foregoing direction, on December 23, 1981, I conducted a hearing for the purpose of receiving further argument. The United States of America appeared by and through its counsel Craig Starr, Esq.; defendant Joseph C. Bonanno, Sr. appeared by and through his counsel Albert J. Krieger, Esq.; and defendant Jack DiFilippi appeared by and through his counsel Frank Ubhaus, Esq. All counsel argued. The United States filed a briefing memorandum, and the matter was submitted.

After consideration of the argument of counsel, all relevant exhibits, portions of the record, and the briefing memorandum filed by the United States, I find as follows:

1. Louis Peters and Joseph C. Bonanno spoke by telephone on February 15, 1979. Peters told Bonanno that he had been subpoenaed to appear before the Grand Jury and that he was concerned with respect to a transaction consisting of Peters' sale of a Cadillac auto for cash for Bill Bonanno, Joseph Bonanno's son. In the course of the conversation, Joseph Bonanno suggested that Peters withhold the records of that transaction from the Grand Jury. Ex. 105-2. Specifically, the following conversation occurred:

BONANNO: Everything else is, except to, uh, cars, business, payments, you know?

PETERS: Uh huh.

BONANNO: Nothing, nothing, nothing wrong. Just say the boy never bought anything. You know, cars (laughter).

PETERS: No, no, but uh, I'm thinking of the uh, uh, uh of the tall one, when I, uh . . .

BONANNO: Yeah, yeah, but uh, you can't tell them that you give a that. Otherwise you will ruin him.

PETERS: Yes.

BONANNO: Absolutely. That's what they're looking for.

PETERS: Uh huh, uh, okay. What should I say?

BONANNO: Well, I mean, uh, uh, you, you, will talk to them, anything, because, uh, because was, uh, a transaction. That's all.

PETERS: Yeah.

BONANNO: Yeah.

PETERS: Okay. Uh, what, what should I do now, if uh, they give me a subpoena for the records?

BONANNO: For the records?

PETERS: Yes.

BONANNO: Do you have any records there?

PETERS: Yes.

BONANNO: And what do the records say?

PETERS: Well it shows that, uh, uh, around $9,700 in cash was turned over. On the sale of a, of a Cadillac.

BONANNO: Yeah. On the sale of a Cadillac? Does it says, why you turned over for them?

PETERS: Uh, I'm sorry.

BONANNO: Where does, does it say why you uh, you, you was turn over, uh, this money to him?

PETERS: If they should ask me why?

BONANNO: Yeah.

PETERS: Uh, this, uh, I don't know what, what, you know, I'm, I don't know what to say. That's why, that's why I wanted to talk to you.

BONANNO: Yeah. But I mean, this is, I don't know. I never knew this. Right?

PETERS: Yeah.

BONANNO: I never knew this.

PETERS: Uh huh.

BONANNO: I never knew this.

**PETERS:** Uh huh.

**BONANNO:** And I never know.

**PETERS:** But if, if, they see, you know, if they, if they subpoena the records.

**BONANNO:** Yeah.

**PETERS:** It'll, it'll be there, that uh, you know, that Bill received that uh, uh, the money on the sale of a Cadillac in cash.

**BONANNO:** Yeah, yeah, but uh, but can, uh, this be taken out or what?

**PETERS:** What's that?

**BONANNO:** Could be taken out, or what?

**PETERS:** Uh, could the records be taken out?

**BONANNO:** Yeah.

**PETERS:** Yes.

**BONANNO:** Sure, that's all. They don't have to know.

**PETERS:** Okay.

**BONANNO:** Yes. That's the only, play safe, you know. Because if you do, you do, uh, something. It's not a question of wrong. You ruin him, you know?

Ex. 105-2, pp. 7-10.

Further, in the same conversation the following was said:

BONANNO: You, you gotta pull that, that thing completely out. You know?

PETERS: Okay.

BONANNO: He says, about you had, the tall guy, you had and I says, well, if he has, I think he had a car, but I don't know. It is not up to you to answer, you know?

PETERS: No, I, yeah.

BONANNO: They know where to go. You know?

PETERS: Hmm, hmm.

BONANNO: And only him can, can explain.

PETERS: Yes, yes, I understand.

BONANNO: Eh, eh, see?

PETERS: I didn't, I didn't sell him the car, so I don't know anything about it.

BONANNO: That's right, that's right, that's right, exactly.

Ex. 105-2, pp. 12 & 13.

**Further, in the same conversation:**

**PETERS: Well, this, this is why I called, so that . . .**

**BONANNO: Alright.**

**PETERS: You know, so I would know exactly what to do.**

**BONANNO: Yeah, well you never talked to me, you know.**

**PETERS: Huh?**

**BONANNO: If they say, uh, before you came here, before the jury, did you talk, uh, with the old man? I says, what do you mean, uh, talk?**

**PETERS: Well what, what are they talking about? I don't know what they're talking about.**

**BONANNO: Huh?**

**PETERS: I don't know what they're talking about.**

**BONANNO: That's right. Because we know that you call uh, eh, at that time. You know, maybe the telephone call, the last time, eh, or before. You know?**

**PETERS: Yeah, well, I, I wished, uh, I wished, uh, I wished Mrs. B. a happy Valentine's Day.**

BONANNO: A happy Valentine's Day? Yeah, because you, you said you, I, I always call to, to, to know, how he feels.

PETERS: Yes.

BONANNO: That's right.

Ex. 105-2, p. 17.

Further, in the same conversation:

BONANNO: So, at this moment, on this moment, we'll do this. At this moment, that, ah, you pull that thing out there completely, huh?

PETERS: I'll pull it out like you want me to. Yes, sir.

BONANNO: Yes. And then save it in someplace very good, you know?

PETERS: Sir?

BONANNO: You save it in a place, in a good spot, you know?

PETERS: Thank you, sir.

BONANNO: This is temporary, you know?

PETERS: Yes, sir.

BONANNO: And then if a, if in case we want to destroy, you destroy after. Huh?

PETERS: Huh, uh, I can't hear you, sir.

BONANNO: If it's got to be destroyed, burn after, you do after.

PETERS: Yes, sir.

Ex. 105-2, pp. 21 & 22.

Further,

BONANNO: Alright, so bout just about, pull out that, that thing, you know?

PETERS: Sir?

BONANNO: Pull out the paper. Huh?

PETERS: Ya, I'll, I'll take out the paper from the, uh, the Cadillac.

BONANNO: Yeah, that's right.

PETERS: And a, destroy it.

BONANNO: No, no only for, for that, huh?

PETERS: Yes, sir.

BONANNO: And then, you save it good.

PETERS: Yes, sir, they won't know anything about it.

BONANNO: That's right, not in your house, you know.

PETERS: No, sir.

Ex. 105-2, pp. 22 & 23.

Further,

BONANNO: It is better to avoid anything until my situation is clear, you know?

PETERS: Yes, I, I not, I understand.

BONANNO: And then I will call, eh?

PETERS: Okay, sir.

BONANNO: And then if you say John, uh, you know what we say.

PETERS: Ya, yes, sir.

BONANNO: Alright, then we do that.

PETERS: Okay, thank you, sir.

BONANNO: At this moment, uh, do this. This moment do this. Uh, pull out, take out the paper.

PETERS: Yes.

BONANNO: Uh, bring it some place, until uh, then, then, then you burn after, huh?

**PETERS:** Alright.

**BONANNO:** Okay.

**PETERS:** Yes, sir.

**BONANNO:** You know, so, so, I will think a couple of days it over on this case, heh?

**PETERS:** Okay, I'll, I'll take it out right now.

**BONANNO:** Yes, yes.

**PETERS:** Uh huh.

**BONANNO:** But listen, don't bring home, you know?

**PETERS:** No, no, I'll uh . . .

**BONANNO:** Yes.

**PETERS:** I have a place that I can lock it up.

**BONANNO:** Alright. Okay, fine. Now then, give me a little time, and then uh, we will go on that, uh, again, eh?

**PETERS:** Yes, sir.

**BONANNO:** Eh, someday I will call you again, huh?

**PETERS:** Okay, uh, okay, yes, sir.

BONANNO: Alright?

PETERS: Yes, sir, I'll, I'll look for your call.

BONANNO: Yes, in case, uh, in case I will call and say John, and you're not there, and tell, tell, uh John, I will call again at first time.

Ex. 105-2, pp. 24-26.

Further,

BONANNO: Alright. So about this visit, don't talk with anybody, please.

PETERS: No, no, sir.

BONANNO: If they say, do you talk to witnesses, I mean, I let's not repeat, okay?

Ex. 105-2, p. 26.

2. Between February 15, 1979, and February 22, 1979, Joseph C. Bonanno and Jack DiFilippi spoke by telephone concerning the February 15th conversation between Peters and Joseph Bonanno. RT 2982, 2983; Ex. 111-1, pp. 109, 110.

3. On February 22, 1979, Peters and Jack DiFilippi met in Stockton, California, at Peters' apartment. Ex. 108-1; RT 1407 *et seq.*; 2898 *et seq.* Peters did not reveal to DiFilippi any of the details of his conversation with Bonanno of February 15, 1979. Ex. 108-1, pp. 12, 13.

4. On February 26, 1979, Peters and DiFilippi met at Peters' apartment in Stockton, California. Ex. 111-1. In the course of the conversation, a cash transaction between Peters and Bill Bonanno for the purchase of a Cadillac automobile was discussed. Ex. 111-1, pp. 101-103.

5. In the course of the conversation of February 26, 1979, Ex. 111-1, pp. 109, 110, the following occurred:

PETERS: Yeah, okay. Then he called you after he called me? I mean after I called him?

DIFILIPPI: Right, right.

PETERS: Okay.

DIFILIPPI: And uh, he told me you were concerned with this, uh, with the Cadillac, and the papers and something else in regards to Bill.

PETERS: Um hum.

DIFILIPPI: And, uh, he says to you, if that's what you think will hurt him then take everything out of there is you can.

PETERS: Um hum.

DIFILIPPI: And he says don't worry about it. I'll take care of it.

PETERS: I did.

DIFILIPPI: Alright. Now I didn't tell you anything the other day because I was waiting for you to tell

me, but today I want, I don't want to make a mistake over nothing.

At p. 114:

DIFILIPPI: Yeah, but today they, they could come with a search warrant.

PETERS: For what? Okay. I was waiting for the call because he told me . . .

DIFILIPPI: Um hum. He hasn't called you because he wants to talk to me first.

PETERS: Okay, okay. I got all, I got the original, the duplicates of all the checks. I've got everything okay. I was gonna burn it to get rid of it. Uh, that's probably what he should do cause there's no records up there now. I don't know anything about the car because I never sold it to Bill. I don't know where the hell it is. How the hell would I know. See, maybe four or five years from now, maybe, the car will be registered. But now its running around on dealer plates.

DIFILIPPI: You got the original plates?

PETERS: No original plates, dealer plates. Original plates are gone.

DIFILIPPI: Nobody will say in your shop that they saw the car in and out?

PETERS: No they can't remember. Jack, there's too many care coming in and out. Hell, I can't

remember what cars. I can't even tell you what's on the lot today. We sell, shit, a hundred and fifty cars a month. There's no way you can keep track of them. You, you got to be kidding. What car? Name any car I sold last, I couldn't tell you.

DIFILIPPI: Well, I have to go and see him. And then after, after, when I, I, got to come back over here. Okay?

PETERS: Do you want?

DIFILIPPI: What?

PETERS: What, what.

DIFILIPPI: The papers?

PETERS: Just so you could show him. I don't know. See if, uh.

DIFILIPPI: No, no, no, no. Keep the papers. Don't, don't keep the papers for the time being, but save the, save the papers.

PETERS: Do you wish that I put them, safety deposit box or something?

DIFILIPPI: No, no, no, no. Worse yet.

PETERS: Well, where can I put them? Why don't you hold them for me? I don't know. Where can I put them. You tell me.

DIFILIPPI: I don't know. Just, just keep them for the time being. Keep them for the time being. The, uh . . .

PETERS: Okay, but now, you said that they could subpoena here.

DIFILIPPI: Well, uh. To go to trial first you got to go in front of Grand Jury, with it and the, uh, then uh, if they, if they think something is screwy, you know, well then . . .

PETERS: Then they could.

DIFILIPPI: And then they might. By the time we uh . . .

PETERS: See, we got, uh, what seven, what's today?

At p. 116:

PETERS: But you see, I didn't know what to do and I'd do anything for Mr. B. I would do it for you if you asked me.

DIFILIPPI: Well, I'll have to see anyway.

PETERS: Okay, you know.

DIFILIPPI: In a few days, okay?

PETERS: Yeah.

DIFILIPPI: And then I, I'll come back to you, okay?

PETERS: Okay, I thought what I did was right.

DIFILIPPI: That, that, that's, that's right but I don't see how it could hurt him. I don't see how.

On February 26, 1979, in the late afternoon, DiFilippi helped Peters hide the records in the latter's apartment. Ex. 112-1.

Peters testified as follows, at RT 1438 & 1439:

Q. Mr. Peters, in the last part of the conversation, which is on page 13 of the transcript, and that we just heard, there is Mr. DiFilippi saying "Yeah, now where is the dirty linen that you got over here?"

You say, "Yeah, where is it, I got a pile."

And both of you disappear from view of the camera, is that correct?

A. That's correct.

Q. Now, what was happening at that moment?

A. We took the original copies of the sale of the car and the check that was in the folder and went into the hall and into my bedroom.

Q. Now where were these documents before you went into your bedroom?

A. They were on the table in the briefcase.

Q. They were in your briefcase?

A. Yes.

Q. All right, and you got them out of the briefcase?

A. Yes.

Q. And then the two of you went into your bedroom?

A. That's correct.

Q. And what happened in there?

A. From there we went into the walk-in closet and I handed Jack the folder, and he says "put it underneath the box up on the top shelf."

Q. Wait a minute. Did he take the folder from you at that point?

A. Yes, he did.

Q. All right.

A. And I lifted up the box and he couldn't reach it, so then I took the folder and put it underneath the box on the self.

6. On March 21, 1979, DiFilippi met with Peters, and the following conversation occurred. Ex. 113-1, pp. 10 & 11:

DIFILIPPI: In other words, if, if he asks you to bring down the records and everything that was Bill and Joseph's transaction, whatever the nature they are, right or wrong?

PETERS: Everything, yes.

DIFILIPPI: Everything.

PETERS: Yes.

DIFILIPPI: You take everything with you. Including that car, the Cadillac.

PETERS: Okay.

DIFILIPPI: Okay, and, ah, suppose they would ask you the question if uh, if uh, you got, you got paid in cash or check. You don't recall that. How you got paid.

PETERS: Alright, you want me to say that if, they ask me . . .

DIFILIPPI: Uh huh.

PETERS: Did I get paid in cash or . . .

DIFILIPPI: Or check.

PETERS: Or check.

DIFILIPPI: Not that you got paid in cash or check. Did you pay him?

PETERS: Did I pay him in cash or check?

DIFILIPPI: You don't recall that.

PETERS: You want me to say I don't recall.

DIFILIPPI: You don't recall it. I mean, you don't recall because of those things. I mean. That, it, it could be, isn't it?

PETERS: Yeah.

DIFILIPPI: Normal transaction as you know.

7. On March 21, 1979, DiFilippi suggested to Peters answers to be given to the Grand Jury by Peters if the latter were asked if he had talked to DiFilippi concerning his testimony. Ex. 113-1, pp. 59-61.

On the basis of the foregoing evidence I conclude as follows:

1. Joseph C. Bonanno and Jack DiFilippi beyond a reasonable doubt conspired and agreed to induce Lewis Peters to conceal from a Grand Jury duly empanelled in the Northern District of California, documentary evidence pertaining to an automobile transaction wherein Peters sold a Cadillac automobile belonging to Bill Bonanno and paid the proceeds of said sale to Bill Bonanno in cash.

2. Joseph C. Bonanno and Jack DiFilippi conspired and agreed to influence the testimony before said Grand Jury of Lewis Peters with respect to said transaction.

3. In furtherance of the conspiracy and agreement between Joseph C. Bonanno and Jack DiFilippi, DiFilippi advised Peters to hide the records in question and physically aided Peters in hiding them in Peters' apartment. Testimony of Peters, Ex. 112-1.

4. In furtherance of the conspiracy and agreement Jack DiFilippi instructed Lewis Peters as to how to answer questions put before the said Grand Jury and how to answer questions put with respect to conversations between Lewis Peters and Jack DiFilippi, and specifically to state that such conversations occurred a year prior to the Grand Jury testimony of Peters, and specifically to state that Peters could not specifically recall whether he had paid the proceeds of the automobile sale to Bill Bonanno in cash or by check. Ex. 113-1.

5. The agreement and conspiracy by and between Jack DiFilippi and Joseph C. Bonanno, Sr., is circumstantially demonstrated by each of the following:

(i) Bonanno gave Peters instructions with respect to the retrieval and concealment of the records of the automobile sale transaction on February 15, 1979. Ex. 105-2.

(ii) DiFilippi and Bonanno spoke by telephone between February 15, 1979 and February 22, 1979, and discussed the Peters-Bonanno phone call of February 15, 1979. 41 RT 2894-2901; Ex. 111-1, pp. 109, 110.

(iii) In the course of the DiFilippi-Peters conversation of February 22, 1979, Ex. 108-1, Peters did not reveal any of the details of the Peters-Bonanno conversation February 15, 1979, to DiFilippi.

(iv) In the course of the DiFilippi-Peters conversation of February 26, 1979, Ex. 111-1, DiFilippi repeated all of the details of the Bonanno-Peters conversation of February 15, 1979, thus corroborating his statement that he had a conversation with Bonanno prior to February 22, 1979, concerning the Peters call of February 15, 1979. Ex. 111-1, p. 110.

(v) The instructions given by Bonanno on February 15, 1979, Ex. 105-2, with respect to disposition of the records, and by DiFilippi on February 26, 1979, Exs. 111-1; 112-1, are virtually identical.

(vi) Jack DiFilippi expressed his opinion that the records in question were not harmful to the interests of Bill Bonanno, Ex. 111-1, p. 116, thus negating any inference that his overt activity was performed independently and alone and pursuant to his own intent and design as distinguished from conspiratorial activity.

6. A conspiratorial agreement may be proven by circumstantial evidence. *Glasser v. United States*, 315 U.S. 60 (1945).

"Participation in a criminal conspiracy need not be proved by direct evidence; a common

purpose and plan may be inferred from 'a development and a collocation of circumstances.'"
315 U.S. at 80.

7. The facts above-referred to which circumstantially demonstrate the formation of a conspiratorial agreement are not equally consistent with a reasonable hypothesis of innocence.

8. Extrajudicial statements of a defendant are admissable as non-hearsay admissions and may be properly used as evidence of conspiracy.

*United States v. Perez*
658 F.2d 654 (9th Cir. 1981)

*United States v. Cawley*
630 F.2d 1345 (9th Cir. 1980)

*United States v. Weiner*
578 F.2d 757 (9th Cir.), *cert. denied*,
439 U.S. 981 (1978).

9. The totality of the evidence above reviewed demonstrates a specific intent on the part of defendants and each of them to obstruct and impede the function of a Grand Jury by preventing knowledge by the Grand Jury of the source and nature of assets and capital received by persons then under investigation by the Grand Jury and to prevent the Grand Jury from learning of corrupt endeavors to keep such material facts from the knowledge of the Grand Jury.

10. The instructions by DiFilippi to Peters contained in Ex. 111-1 and in Ex. 113-1, and the acts of DiFilippi in

physically aiding Peters in the hiding of records as recounted in the testimony of Peters and of DiFilippi and otherwise demonstrated by Ex. 112-1, each constitute overt acts undertaken and performed for the purpose of furthering and accomplishing the unlawful purposes of the conspiracy. Each of said overt acts was proven beyond a reasonable doubt.

11. None of the overt acts so proven are alleged in the Indictment, and none of the overt acts which are alleged in the Indictment were proven by the evidence herein discussed.

A conspiracy conviction may rest upon proof of an overt act not charged in the Indictment, unless the resulting variance affects the substantial rights of the defendant. *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967).

While this aspect of this case is troubling, it is noted that in evaluating the effect of the variance upon the rights of the defendant the *Brulay* court evaluated such things as absence of objection to the admission of evidence of the unalleged overt act, absence of claim of surprise, absence of motion for bill of particulars, and no showing of any lack of knowledge on the part of defendant and his counsel of the evidence supporting the unalleged overt act.

Other circuits have taken a similar view. *See United States v. Armone*, 363 F.2d 385 (2nd Cir. 1966); *Napolitano v. United States*, 340 F.2d 314 (1st Cir. 1965); *Culp v. United States*, 131 F.2d 93 (8th Cir. 1942); *Worthington v. United States*, 1 F.2d 154 (7th Cir.), *cert. denied*, 266 U.S. 626 (1924); 72 Harvard L.R. 920, 992, 993 (1959).

In the instant case, the record does not reveal any claim of surprise or claim of lack of knowledge on the part of either defendant of the evidence supporting the unalleged overt act. There was discussion of the possibility of outrageous prosecutorial misconduct with respect to the Peters incident, and of a possibility of entrapment, and of possible noncompliance with Federal Bureau of Investigation standards concerning undercover agents. From the argument presented on December 23, 1981, it is apparent that the defendants regarded the Peters incident evidence as having been offered for the purpose of proving specific intent and not of acts taken in furtherance of the conspiracy alleged in the Indictment. However, none of the above, or any other objections indicate any deprivation of knowledge on the part of defendants of the existence of the evidence and knowledge of it. I, therefore, conclude that the variance resulting from the proof of the unalleged overt act does not substantially and unfairly affect the substantial rights of defendants or of either of them.

12. I conclude on the basis of the above that there is sufficient evidence beyond reasonable doubt of the guilt of defendants and each of them apart from evidence seized as a result of the search of the defendant Bonanno's trash.

Dated: 1 11 82

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge

## APPENDIX D

[FILED JUL 30 1982]

[RECEIVED AUG 2 1982]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-1020
81-1021
D.C. No. 79-701-WAI-SJ

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

JOSEPH C. BONANNO, SR. and JACK DIFILIPPI,
*Defendants-Appellants.*

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding
Argued and submitted September 17, 1981

Before: TANG and ALARCON, Circuit Judges, and KELLAM,* District Judge

### MEMORANDUM

Joseph C. Bonanno, Sr. (Bonanno) and Jack DiFilippi were indicted for inter alia, a conspiracy to obstruct

*Hon. Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

justice. The trial judge, sitting without a jury, found Bonanno and DiFilippi guilty of the charged conspiracy. DiFilippi was also found guilty of several counts of perjury. Bonanno and DiFilippi have appealed the verdict on the conspiracy charge in the matter before this court.

## DISPOSITIVE ISSUES

The present posture of this matter presents the following issues.

**One.** Was there a fatal variance between the overt acts which were pleaded and the overt acts relied upon by the district court in finding the defendants guilty of conspiracy to obstruct justice solely on the Peters transactions?

**Two.** Was there sufficient competent evidence to sustain a conviction for conspiracy to obstruct justice?

**Three.** Was the evidence concerning Peters fruit of the poisoned tree or independently, or inevitably discovered?

## PERTINENT FACTS

### A. Background

Review of this matter on appeal has been complicated by the fact that the government presented evidence of separate transactions in support of its theory that Bonanno and DiFilippi conspired to obstruct justice. The district court based its finding of guilt upon evidence concerning transactions with Louis M. Peters.[1] Accordingly, a review

of the facts involving Peters and the theory articulated by the government is necessary to determine the merits of the variance issue discussed *infra*.

In December, 1975, agents of the Arizona Drug Control District and the FBI began removing and inspecting the trash of Bonanno by removing the contents of his refuse container and replacing it with other material. Scraps of torn paper containing notes made by Bonanno were reconstructed, read, and analyzed by both state and federal authorities. The information thus procured was used in October, 1978, to obtain court permission pursuant to 18 U.S.C. §2516 (authorization for interception of wire or oral communications) to conduct interceptions of Appellants' communications over Bonanno's home phone. It was also used in obtaining a warrant to search Bonanno's home in March, 1979. The search of Bonanno's trash continued for a period of over three years, until April, 1979.

In June, 1977, Peters, the owner of a car dealership in Lodi, was approached with an offer to buy his dealership. RT: Vol. 29, pp. 1323-24. The prospective buyer, Elmer Birch, drove Peters to a meeting that included Joseph Bonanno, Jr. and Salvatore Bonanno (Bill Bonanno) (Salvatore was also known as Bill). RT: Vol. 12, p. 12. After the meeting, Birch took Peters back to the car dealership. Peters then drove to the home of Mark Yates, Chief of Police of Lodi, and told him of the meeting. *Id.* at 1326. Two days later Peters met with FBI agents to discuss the meeting. Shortly thereafter Peters agreed to cooperate with the FBI. *Id.* at 1229-30.

The FBI installed equipment for the consensual monitoring of Peters' telephone conversations. Peters developed a friendly relationship with Bill Bonanno and Appellant Jack DiFilippi. Peters recorded many of his numerous meetings and conversations with them over the next two years. By early February, 1979, the FBI decided to terminate Peters' role as an informant because no evidence of criminal activity had been developed. RT: Vol. 29, pp. 1392-93; Vol. 31, pp. 1548-49. FBI agents arranged for Peters to be subpoenaed to appear before the grand jury so that he could withdraw from his associations with the Bonannos, DiFilippi, and the others, without disclosing his cooperation with the government. Peters was instructed by the FBI to call Bonanno to tell him of the subpoena. *See id.*

On February 15, 1979, a subpoena was issued for Peters to appear before the grand jury in San Francisco, California. RT: Vol. 29, pp. 1392, Ex. 105-2 at 1. The grand jury was investigating the activities of Bonanno's two sons, Bill and Joseph. Brief for Appellant Joseph C. Bonanno, Sr. at 11. The day Peters received the subpoena, he called Bonanno to tell him. *See* RT: Vol. 29, pp. 1394-95. When Peters talked to Bonanno, Peters explained that he had something very important to tell Bonanno. Ex. 105-1 at 2. Bonanno arranged to call Peters back from a public telephone. *See id.* pp. 3-4. Both the first and the second conversations were recorded. RT: Vol. 29, p. 1394.

During the second conversation that Bonanno and Peters had, they discussed what Peters should do about the subpoena. According to the taped conversation, Peters indicated to Bonanno that he was concerned about a Cadillac he had sold for Bill Bonanno. Ex. 105-2

at 2.[2] Bonanno concluded the conversation with an admonition to Peters not to reveal that it had occurred.[3] DiFilippi testified that Bonanno talked with DiFilippi during the time period between Bonanno's conversations with Peters on February 15, 1979, and February 22, 1979. *See* RT: Vol. 41, p. 2897-99. DiFilippi and Bonanno discussed the conversations Peters had with Bonanno and the problem of the Cadillac sale. *Id.* DiFilippi also testified that when he asked Peters what had happened, Peters replied that he could not tell DiFilippi. *Id.* at 2899. Four days later, on February 26, 1979, DiFilippi met with Peters; their conversation was recorded. DiFilippi explained that he had not said "anything the other day because I was waiting for you to tell me . . . ." Ex. 111-1 at 110. DiFilippi explained to Peters that Bonanno had called him after Peters talked with Bonanno. *Id.* at 109. DiFilippi then talked about the problem of the Cadillac sale.[4]

Peters testified that later in the day on February 26, 1979, a second conversation between Peters and DiFilippi was recorded. During this conversation, they discussed how Peters should testify before the grand jury.[5]

Peters testified that the next day DiFilippi helped Peters hide records pertaining to the sale of the Cadillac in Peters' closet. RT: Vol. 30, pp. 1437-39.

On March 21, 1979, DiFilippi suggested answers Peters should give to the grand jury about the Cadillac transaction.[6] DiFilippi also suggested answers to be given if Peters were asked whether he had talked to DiFilippi and if so, what they had talked about.[7]

On April 26, 1979, a grand jury indictment was filed charging that Bonanno and DiFilippi inter alia, "knowingly, willfully, and unlawfully combined, conspired, confederated, and agreed together and with others known and unknown to the grand jury to corruptly obstruct justice, in violation of Title 18, United States Code section 1503." The overt acts listed in the indictment do not include any references to Peters.[8]

B. The Prosecution Trial Theory

In the government's opening statement, prior to the presentation of the government's case in chief, the trial judge was told:

> While this trial will concern numerous dates and events and persons, it is possible to roughly divide the thrust of the criminal attempts to obstruct the Grand Jury in four areas. These are number one, trying to influence the testimony of Kathy Michelis, number two, attempts to conceal records, number three, attempts to influence the testimony of Mike Dorn, Karen Bonanno and Ted Anderson, and four, influencing the testimony of Lou Peters. (RT: Vol. 14, p. 76, lines 1-8).

It is clear from the record that the defendants understood prior to trial, that the government had taped conversations between Peters and Bonanno beginning February 15, 1979 concerning the grand jury proceedings.

At the close of the government's case, Bonanno's counsel made a motion to strike Peter's testimony on

the ground that the government was aware that Bonanno was represented by counsel when the conversations occurred. In the course of argument Bonanno's counsel stated as follows:

> We, that is, court and counsel, certainly became aware during the pretrial hearings, at the very latest, that Mr. Peters had contacted Mr. Bonanno by telephone on or about February 15, 1979, and in the course of the recorded conversation that took place at that time, certain statements were made in the course of the conversation by Mr. Peters which the government has utilized as evidence in this case. (RT: Vol. 33, p. 1797, line 21 to page 1798, line 3).

The government made clear, however, in its reply to the defendant's motion of for entry of a judgment of acquittal, the significance it placed on the Peters transactions. In explaining the relationships of the evidence which had been presented, concerning discrete events, the government's attorney, Mr. Sterrett, told the court, in reference to the Peters transactions:

> It is, I would suggest to the court, a progression of proof, moving from ideas on paper to the words of the co-conspirators to the co-conspirators working with the object [Peters] of their criminal act. (RT: Vol. 35, p. 2025, lines 15-18).

At a later point in these remarks, Mr. Sterrett characterized the significance of the Peters transactions in these words: "I would suggest to the court that this

sequence involving Lou Peters is itself a completed set of circumstances which match the elements of a conspiracy to obstruct justice." (RT: Vol. 36, p. 2149, lines 10-12).

In closing argument, the government made clear that it was not asking the trial court to find the defendants guilty based on the evidence seized from Bonanno's trash cans. Mr. Sterrett argued as follows:

> I say to your honor that those notes have a limited purpose, because we would not begin to suggest to the court that based solely upon those notes that a conviction should be asked for. But they are important in terms of setting the stage for what was going on just prior to the time that we began to get the recorded conversations. And that's the main purpose of them. (RT: Vol. 43, p. 3042, lines 14-20).

At a later point in the opening argument the government referred to the Mike Dorn conversations, the Ted Anderson conversations, and various Peters conversations as "self contained" evidence each of which constituted "a violation of the indictment charged." (RT: Vol. 43, p. 3053, line 12 to p. 3054, line 15).

Mr. Krieger, counsel for Bonanno, commented in concluding his comments on the testimony of Peters as follows: "And the government has sought to prove its charged criminal activity by resort to uncharged criminal activity . . . ." (RT: Vol. 43 p. 3120, lines 9-10).

After the completion of argument on the guilt phase of the trial, the district court took this matter under submission.

### C. The District Court Judgment

On August 12, 1980, the district court issued its Memorandum of Decision, finding each defendant guilty of "the offense charged in Count 1, and DiFilippi guilty of perjury as charged in Courts 2, 4, and 5.

In reviewing the evidence concerning Bonanno's and DiFilippi's conduct with respect to Peters, the district court stated: "In sum, the Peters episode leaves no room for reasonable doubt as to the intent of both defendants or *as to conspiratorial activity.*" (Emphasis in original).

Later in his written comments the district court judge stated: "Because of the means of memorialization the Peters incident speaks clearly for itself, as far as the issues in this case are concerned." Based solely on the above quoted statements it would appear that the trial judge had concluded that the Peters transactions, standing alone, had convinced him beyond a reasonable doubt that the defendants were guilty of conspiracy as charged in Count 1.

Later in the Memorandum of Decision, however, the trial judge made other statements that raised questions in this court's mind as to the precise evidentiary basis for the court's finding on the conspiracy charge. The troublesome language consisted of the following words: "On the basis of *all* the evidence in this case, including those *several items hereinabove referred to* I find that, beyond a reasonable doubt defendants BONANNO and DIFILIPPI are GUILTY of the offense charged in Count 1 . . ." (emphasis added).

Since the trial judge had earlier referred to transactions which occurred prior to February 15, 1979 involving Karen Bonanno and Ted Anderson, it was not clear what part these separate transactions played in the district court's determination that the defendants were guilty of conspiracy.

In order to eliminate all doubt as to the basis for the district court's finding that the defendant's were guilty of conspiracy we remanded this matter to the district court for the limited purpose of making specific findings as to the basis of the court's judgment.[9]

On January 11, 1982, the district court filed its decision in response to the limited remand ordered by this court. The district court set forth portions of the evidence concerning the Peters transactions and advised this court as follows: "I conclude on the basis of the above that there is sufficient evidence beyond reasonable doubt of the guilt of defendants and each of them apart from evidence seized as a result of the search of the defendant Bonanno's trash."

We are now convinced that the district court concluded that the defendants were beyond a reasonable doubt guilty of conspiracy to obstruct justice based on the evidence concerning the defendants' activities with Peters. Accordingly, we need not consider any issue concerning the admissibility of evidence seized from Mr. Bonanno's trash can unless there is proof that the Peters transaction was a fruit of that search.

## DISCUSSION

### A. Variance

The indictment contains no reference to any conversations with Peters or any acts intended to induce him to withhold evidence or give false testimony. The district court found the defendants guilty, however, based on the Peters transactions. We are told that this variance renders the judgment "fatally infirm."

The law of this circuit with respect to the question of whether a conspiracy conviction may rest upon the proof of an overt act that was not specifically charged in the indictment is set forth in *Brulay v. United States*, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967). In *Brulay*, this court held that where such error occurs an appellate court must inquire as to whether any substantial right of the defendant was affected. *Id.* at 351.

Appellants have not indicated in what manner their substantial rights were affected by the variance in this case. As outlined above, the record establishes that defendants were aware before trial of the existence of the taped Peters conversations. The government repeatedly advised the trial court, beginning with the opening statement, that it was the theory of the prosecution that a conspiracy to obstruct justice could be sustained based solely on the instructions given by Bonanno and DiFilippi to Peters. Defense counsel did not object to the introduction of the Peters evidence on variance grounds, or seek a bill of particulars or claim surprise. The Peters testimony and taped conversations concerning Bill Bonanno's assets and income were related

to the type of conduct set forth in the indictment, *i.e.*, attempts to influence witnesses to lie and to withhold evidence from the grand jury. No motion was made to limit the admission of the Peters evidence to proof of intent or for any other purpose. Peters was presented as a witness at trial and thoroughly cross-examined.

Bonanno suggests that a trial by jury would not have been waived if he had been faced with a trial restricted to evidence of the Peters transactions. Specifically he argues: "Because of the nature and bulk of the evidence that was to be introduced, in the way of notes and taped telephone conversations, Mr. Bonanno, through counsel, made the decision to waive his right to a jury trial." Supplemental Brief of Appellant Joseph C. Bonanno, Sr., at 12. This argument is unpersuasive. First, it refers to matters outside the record that are properly before this court, *i.e.*, the reasons which motivated the defendants to waive jury. Second, we are not told in what manner a trial by a judge, standing alone, impairs a defendant's substantial rights. We find no reversible error based on the variance between the overt acts pleaded and those relied upon by the trier of fact in finding the defendants guilty of conspiracy.

B. Sufficiency of the Evidence

Appellants claim that the evidence upon which the trial judge found them guilty of conspiracy to obstruct justice was not sufficient to support such a finding. They also argue that their taped conversations were inadmissible hearsay. We disagree.

A conspiracy is established when there is an agreement to accomplish an illegal objective, an overt

act in furtherance of the illegal objective, and the intent necessary to commit the underlying offense. *United States v. Diggs*, 649 F.2d 731, 736 (9th Cir.), *cert. denied*, 102 S.Ct. 516 (1981); *United States v. Oropeza*, 564 F.2d 316, 321 (9th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978). The existence of a conspiracy may be established by circumstantial evidence from which a common scheme or plan may be inferred. *Diggs*, 649 F.2d at 736. We must affirm the judgment of the district court on the conspiracy charge if, viewing the evidence in the light most favorable to the government, there is relevant evidence from which any rational trier of fact could find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Wilson*, 666 F.2d 1241, 1249 (9th Cir. 1982).

Applying these principles to the matter sub judice, the following evidence established the existence of a conspiracy:

1. Peters testified that Bonanno and DiFilippi had involved themselves in Bill Bonanno's dealings with Peters concerning purchase of his car agency. During the course of Peters' relationship with Bill Bonanno, Peters sold a Cadillac for him.

2. Peters was subpoenaed to appear in front of a grand jury that was investigating Bill Bonanno's business affairs.

3. Peters testified that he told defendant Bonanno he had received the subpoena.

4. The taped conversations between defendant Bonanno and Peters on February 15, 1979 reveal that

defendant Bonanno directed Peters to remove documents relating to the sale of Bill Bonanno's Cadillac and to be prepared to destroy them.

5. The taped conversation between DiFilippi and Peters on February 27, 1979, indicates that DiFilippi directed Peters to put documents relating to the sale of Bill Bonanno's Cadillac in a "place where nobody thinks that it would be." Ex. 112-1 at 23.

6. Peters testified that on February 27, 1979, DiFilippi helped him hide documents related to the sale of Bill Bonanno's Cadillac in Peters' closet.

7. The taped conversation between DiFilippi and Peters on March 21, 1979 shows that DiFilippi suggested Peters give inaccurate responses to the grand jury if questioned about any conversation Peters had with Bonanno.

This evidence and the reasonable inferences that can be drawn therefrom established that defendant Bonanno and DiFilippi agreed to induce Peters to obstruct justice in violation of 18 U.S.C. §1503.

We find without merit Appellants' contentions that the taped conversations were inadmissible in proving the conspiracy charges. First, each defendant's own recorded statements are admissible against that defendant as a party admission. Fed.R.Evid. 801(d)(2)(A). Second, each defendant's statements are admissible against the other defendant as statements by a coconspirator of a party during the course and in furtherance of the conspiracy. Fed.R.Evid. 801(d)(2)(E). Appellants properly point out that independent evidence of a conspiracy is

a prerequisite to the admissibility of a coconspirator's statement under 801(d)(2)(E). Each defendant's own recorded statements, however, provide substantial independent evidence to establish the existence of the conspiracy so as to permit the introduction of the other defendant's statements. *See United States v. Perez*, 658 F.2d 654, 659 (9th Cir. 1981); *United States v. Weiner*, 578 F.2d 757, 770 (9th Cir.), *cert. denied*, 439 U.S. 981 (1978). Both sets of taped conversations were therefore admissible against each coconspirator.

The evidence viewed in the light most favorable to the government, is such that any rational trier of fact could find guilt beyond a reasonable doubt. *See Jackson*, 443 U.S. at 318-19; *Wilson*, 666 F.2d at 1249.

C. Taint

We have searched the record with special care to determine if the evidence concerning the Peters conversations was the result of the exploitation of information obtained from the trash search.

There is no evidence showing a factual nexus between the trash search and the conversations which began on February 15, 1979. The relationship between Peters and the defendant arose out of an offer by Bill Bonanno to buy Peters' Cadillac agency. Peters was asked by the FBI to go along with the proposed deal. After almost two years, the FBI determined that Peters should cease all contacts with the Bonanno family. Thus, the February 15, 1979 telephone conversation was made, not to gather evidence but to end Peters' investigative efforts. The Peters transactions were therefore untainted

and independent of any connection with the trash can search.

Because the district court did not rely on any evidence obtained as a result of the trash can search in determining the guilt of the defendants we need not decide whether the conduct of any of the officers was violative of the fourth amendment.

The judgment of the district court is AFFIRMED.

## FOOTNOTES

[1]The basis of the finding of guilt by the district court is discussed *infra*.

[2]In discussing what Peters should do with any documents relating to the sale, Bonanno made the following statements which were taped:

> BONANNO: So, at this moment, on this moment, we'll do this. At this moment, that, ah, you pull that thing out there completely, huh?
>
> PETERS: I'll pull it out like you want me to. Yes, sir.
>
> BONANNO: Yes. And then save it in someplace very good, you know?
>
> PETERS: Sir?
>
> BONANNO: You save it in a place, in a good spot, you know?
>
> PETERS: Thank you, sir.
>
> BONANNO: This is temporary, you know?
>
> PETERS: Yes, sir.
>
> BONANNO: And then if a, if in case we want to destroy, you destroy after. Huh?
>
> PETERS: Huh, uh, I can't hear you, sir.
>
> BONANNO: If it's got to be destroyed, burn after, you do after.
>
> PETERS: Yes, sir.

Ex. 105-2 at 21-22.

[3] BONANNO: Alright. So about this visit, don't talk with anybody, please.

PETERS: No, no, sir.

BONANNO: If they say, do you talk to witness, I mean, I let's not repeat [inaudible] okey?

PETERS: Yeah, yes, sir.

*Id.* at 26.

[4] DI FILIPPI: And uh he [Bonanno] told me that you were concerned with this, uh, with the Cadillac, and the papers and something else in regards to Bill.

PETERS: Um hum.

* * *

DI FILIPPI: And, uh, he says to you, if that's what you think will hurt him then take everything out of there if you can.

*Id.* at 109.

[5] DI FILIPPI: Uh, well, this is you talking. Now . . . [the grand jury] is going to ask you if you informed me or told me.

PETERS: All right. What, what is the best way for me to say?

* * *

PETERS: All right. Then, then supposing . . . [the grand jury] says all right, now, fine, uh, in the time that, uh, you and Jack were together afterwards.

DI FILIPPI: Um hum.

**PETERS:** Did you discuss the subpoena, or was, uh Mr. Bonanno's name brought up?

**DI FILIPPI:** No.

* * *

**DI FILIPPI:** You called him [Bonanno] on the phone. You told him on the phone it's important that I talk to you.

**PETERS:** Yeah.

**DI FILIPPI:** Okay, now suppose it is bugged.

**PETERS:** Yeah.

**DI FILIPPI:** They [the grand jury] will pick it up. They will say to you, he will say to you, well what is so important that you want to talk to Mr. Bonanno about? What are you going to say? Huh? Don't you see that, what, well, that's the credibility what he's trying to do. To shake.

**PETERS:** Who?

**DI FILIPPI:** Your credibility starts to shake then. With him. Because if you. Because they already know what you told, told, called him and he said he wanted to talk to you.

**PETERS:** Uh, okay.

**DI FILIPPI:** Now let us see.

**PETERS:** How, how would this sound?

**DI FILIPPI:** Let us see if you, you sharp.

**PETERS:** All right. How would this sound? My mother's lost the sight of one eye.

* * *

PETERS: My understanding is that Mr. B is from, uh, the New York area. I thought, my mother's from, lives in Binghamtom, New York.

DI FILIPPI: Hm hm, hm hm.

PETERS: I thought maybe he might know of some expert, surgeon, that I could have flown in to Binghamton to take, cause my mom only has one eye left.

DI FILIPPI: Hm hm.

PETERS: No?

DI FILIPPI: Well, well.

* * *

DI FILIPPI: Ya, ya, you can say for instance that Uh, due, due to that, uh, necessity of your mom for the operation, I want you to know. You want to know from him if he knew back East because that's where he's coming from, any good, good surgeon, eye surgeon.

PETERS: Yeah.

DI FILIPPI: And this is why, this is why, I, I called him. In the meantime, you know, I took the, the chance, the occasion to wish him and also his wife [Happy Valentine's Day].

Ex. 112-1 at 27-30.

DI FILIPPI: Okay. And, ah, suppose they would ask you the question if, uh, if uh, you got, you got paid in cash or check. You don't recall that. How you got paid.

PETERS: Alright, you want me to say that if, they ask me . . .

DI FILIPPI: Uh huh.

Ex. 113-1 at 10.

[7] DI FILIPPI: So they would ask you, for instance, about, uh, Mr. DiFilippi's, did you talk to Mr. DiFilippi? Did you go and talk to Mr. DiFilippi? Did he give you any suggestions, or whatever? I don't think that, uh, Mr. DiFilippi ever gave me any suggestion. I don't think that I go and talk to Mr. DiFilippi. Ah, but the truth of the matter is that when I was talking to Mr. DiFilippi which has been a year before, he told me a year before. I told him. You asked me if I was in debt before and I said yes I was.

PETERS: Uh huh.

DI FILIPPI: And that is the truth. I told you that, uh, hiding information of any kind in a grand jurys, you know I mean, mean, is punishable by law. That means obstruction of justice.

*Id.* at 60.

[8] A. On September 4, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, a witness before the grand jury, in Los Gatos, California;

B. On September 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

C. On September 13, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

D. On September 17, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

E. On September 26, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Safford, Arizona to Karen Bonanno, in Los Gatos, California;

F. On October 8, 1978, defendant JACK DI FILIPPI placed a telephone call from a telephone in the city of San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

G. On October 8, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

H. On October 9, 1978, the defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

I. On October 10, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

J. On October 10, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

K. On October 11, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

L. On October 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in San Francisco, California;

M. On October 12, 1978, defendant JACK DIFILIPPI placed a telephone call from Burlingame, California, to the defendant JOSEPH C. BONANNO, SR., in Tucson, Arizona;

N. On October 12, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the federal grand jury in San Francisco, California, as charged

in Counts Two and Seven of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

O. On October 13, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

P. On October 14, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

Q. On October 16, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

R. On October 18, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

S. On October 24, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

T. On october 25, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

U. On October 26, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the grand jury in San Francisco, as charged in Counts Three, Four, Five and Six of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

V. On or about October 28, 1978, defendant JACK DIFILIPPI travelled from his home in San Jose, California, to the Federal Prison Camp at McNeil Island, State of Washington, to speak to Salvatore "Bill" Bonanno, son of defendant JOSEPH C. BONANNO, SR. and a principal in the businesses named in paragraph 1 of this Count.

W. On October 29, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona.

X. On March 1, 1978, defendant JOSEPH C. BONANNO, SR. willfully withheld from the federal grand jury in Tucson, Arizona subpoenaed records and documents of and pertaining to the businesses named in Paragraph 1 of this Count.

Y. On or about March 16, 1979, defendant JOSEPH C. BONANNO, SR. destroyed subpoenaed records and documents of Kachina Fashions, Inc.

*The order stated:

Upon its own motion, the court remands this matter for 21 days to the district court for the limited purpose of making specific findings as to the basis for the court's judgment that defendants DiFilippi and Bonanno were guilty of conspiracy to obstruct justice. In particular, the district court is requested to make an express finding as to whether there was sufficient evidence, beyond a reasonable doubt, of the defendants' guilt apart from any evidence seized as a result of the search of defendant Bonanno's trash. For the purpose of making these findings, the district court shall conduct a hearing to consider additional argument on this limited issue.

The parties may file supplemental briefs addressing this issue within 14 days of any finding made by the district court pursuant to this order of limited remand.

Upon receipt of the court's findings and any supplemental briefs submitted by the parties, this matter will be resubmitted to this panel for decision.

## APPENDIX E

[FILED OCT 15 1982]

[RECEIVED OCT 18 1982]

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 81-1020 and
81-1021

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

*v.*

JOSEPH C. BONANNO, SR.
and JACK DIFILIPPI,
*Defendants-Appellants.*

Before: TANG and ALARCON, Circuit Judges, and KELLAM,* District Judge

### ORDER

Appellant Difilippi's motion to join in appellant Bonanno's petition for rehearing and suggestion for rehearing en banc is granted.

---

*Honorable Richard B. Kellam, Senior United States District Judge for the eastern District of Virginia, sitting by designation.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

## APPENDIX F

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**United States Constitution**

**First Amendment:**

> Congress shall make no law . . . abridging the freedom of speech . . .

**Fifth Amendment:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor be deprived of life, liberty, or property, without due process of law . . . .

**Sixth Amendment:**

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**18 U.S.C.**

Section 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1503:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having

**been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs or impedes, or endeavors to influence, obstruct, or impede the due administration of justice, shall be fined no more than $5,000 or imprisoned not more than five years, or both.**

**Rule 801(d)(2)(e), Federal Rules of Evidence:**

**The following definitions apply under this article:**

* * *

**(d) *Statements which are not hearsay.***

**A statement is not hearsay if—**

* * *

**(2) *Admission by party-opponent.* The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.**

## APPENDIX G

[FILED APR 26, 1979]

[RECEIVED APR 30 1979]

G. WILLIAM HUNTER
United States Attorney

CRAIG A. STARR
Special Attorney
United States Department of Justice
450 Golden Gate Avenue, Box 36132
San Francisco, California 94102
(415) 556-0750

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CR. NO. 79-701-WAI-SJ

VIOLATIONS: 18 U.S.C. §371
(Conspiracy)
18 U.S.C. §1623
(Perjury)

UNITED STATES OF AMERICA,
*Plaintiff,*

*v.*

JOSEPH C. BONANNO, SR.
and JACK DIFILIPPI,
*Defendants.*

## INDICTMENT

COUNT ONE: (18 U.S.C. §371)

The Grand Jury Charges: THAT

1. At all times pertinent to this Indictment:

a) The sons of defendant JOSEPH C. BONANNO, SR. and their families and associates owned and operated certain businesses in the Northern California area, specifically, U.S. Mattress and Furniture Co.; Kachina Enterprises, Inc.; Kachina Fashions, Inc.; and Los Gatos Construction Co.; and defendant JOSEPH C. BONANNO, SR., from time to time gave money to the foregoing businesses and to his sons;

b) The Federal Grand Jury in the Northern District of California and the Federal Grand Jury in the District of Arizona were investigating alleged violations of federal criminal statutes by persons associated with the foregoing businesses, including, among others, violations which involved:

(i) the use of the foregoing businesses in schemes to defraud;

(ii) the use of the foregoing business to receive and conceal money obtained by fraud;

(iii) the receipt and use of assets, capital, and income of the foregoing businesses by and for the personal benefit of persons associated with the foregoing businesses;

(iv) the use of the foregoing businesses to conceal personal income and assets of persons associated with the foregoing businesses;

c) It was material and relevant to this investigation that the grand jury obtain and examine books and records of and pertaining to the foregoing businesses;

d) It was material and relevant to this investigation that the grand jury know the nature and source of capital, assets, and income of the foregoing businesses, and that the grand jury determine the cash flow of the foregoing businesses;

e) It was material and relevant to this investigation that the grand jury determine how the capital, assets, income and cash flow of the foregoing businesses were used;

f) It was material and relevant to this investigation that the grand jury determine the extent to which individuals associated with the foregoing businesses received and used assets, capital, and income of the foregoing businesses for their personal use and benefit;

g) It was material and relevant to this investigation that the grand jury learn of any improper endeavors to influence its witnesses to withhold evidence or to give false testimony concerning the foregoing areas of inquiry;

2. From in or about September 1978, to and including the return date of this indictment, in the

County of Santa Clara in the Northern District of California, and elsewhere, the defendants JOSEPH C. BONANNO, SR. and JACK DIFILIPPI knowingly, willfully, and unlawfully combined, conspired, confederated, and agreed together and with others known and unknown to the grand jury to corruptly obstruct justice, in violation of Title 18, United States Code, Section 1503;

3. It was a part of the conspiracy to prevent the grand jury from learning all the material facts concerning the nature and source of capital, assets and income of the businesses named in Paragraph 1 of this Count, including facts concerning contributions by the defendant JOSEPH C. BONANNO, SR. to those businesses;

4. It was further a part of the conspiracy to prevent the grand jury from learning the extent to which individuals associated with the businesses named in Paragraph 1 of this Count received and used assets, capital, and income of those businesses for their personal use and benefit, including money contributed to those businesses by the defendant JOSEPH C. BONANNO, SR.;

5. It was further a part of the conspiracy to prevent the grand jury from learning the extent to which the businesses named in Paragraph 1 of this Count were used to conceal personal income and assets of individuals associated with those businesses;

6. It was further a part of the conspiracy to prevent the grand jury from learning of the defendants' illegal agreement to obstruct justice and of their corrupt

endeavors to keep material facts from the grand jury, as described herein;

7. To effect the foregoing objects of this conspiracy the defendants herein agreed to and did:

(a) hide, conceal and destroy books and records of and pertaining to the businesses named in Paragraph 1 of this Count;

(b) endeavor to influence witnesses before the grand jury to give false testimony and to withhold evidence concerning the nature and source of assets, capital, and income to the foregoing businesses;

(c) endeavor to influence witnesses before the grand jury to give false testimony and to withhold evidence concerning the receipt and use of assets and income of the foregoing businesses by and for the personal benefit of individuals associated with those businesses;

(d) endeavor to influence witnesses before the grand jury to give false testimony and to withhold evidence concerning the use of the foregoing businesses to conceal personal assets and income of individuals associated with those businesses;

(e) falsely deny to the grand jury any communications between the defendants concerning this grand jury investigation or concerning other witnesses before the grand jury;

(f) endeavor to influence witnesses before the grand jury to falsely deny the defendants' corrupt

efforts to influence them in the course of this investigation, and to destroy evidence of such efforts.

## OVERT ACTS

In furtherance of the foregoing criminal conspiracy, the defendants committed the following overt acts among others:

A. On September 4, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, a witness before the grand jury, in Los Gatos, California;

B. On September 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

C. On September 13, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

D. On September 17, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno, in Los Gatos, California;

E. On September 26, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Safford, Arizona to Karen Bonanno, in Los Gatos, California;

F. On October 8, 1978, defendant JACK DIFILIPPI placed a telephone call from a telephone in the city of San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

G. On October 8, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

H. On October 9, 1978, the defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

I. On October 10, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

J. On October 10, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

K. On October 11, 1978 defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

L. On October 12, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in San Francisco, California;

M. On October 12, 1978, defendant JACK DIFILIPPI placed a telephone call from Burlingame, California, to the defendant JOSEPH C. BONANNO, SR., in Tucson, Arizona;

N. On October 12, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the federal grand jury in San Francisco, California, as charged in Counts Two and Seven of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

O. On October 13, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

P. On October 14, 1978, defendant JOSEPH C. BONANNO, SR., placed a telephone call from Tucson, Arizona to Karen Bonanno in Campbell, California;

Q. On October 16, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

R. On October 18, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR., in Tucson, Arizona;

S. On October 24, 1978, defendant JOSEPH C. BONANNO, SR. placed a telephone call from Tucson, Arizona to Karen Bonanno in Los Gatos, California;

T. On October 25, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona;

U. On October 26, 1978, defendant JACK DIFILIPPI made false declarations under oath concerning material facts before the grand jury in San Francisco, as charged in Counts Three, Four, Five and Six of this Indictment, which are hereby realleged and incorporated as if fully set forth herein;

V. On or about October 28, 1978, defendant JACK DIFILIPPI travelled from his home in San Jose, California, to the Federal Prison Camp at McNeil Island, State of Washington, to speak to Salvatore "Bill" Bonanno, son of defendant JOSEPH C. BONANNO, SR. and a principal in the businesses named in paragraph 1 of this count.

W. On October 29, 1978, defendant JACK DIFILIPPI placed a telephone call from San Jose, California to the defendant JOSEPH C. BONANNO, SR. in Tucson, Arizona.

X. On March 1, 1978, defendant JOSEPH C. BONANNO, SR. willfully withheld from the federal grand jury in Tucson, Arizona subpoenaed records and documents of and pertaining to the businesses named in Paragraph 1 of this Count.

Y. On or about March 16, 1979, defendant JOSEPH C. BONANNO, SR. destroyed subpoenaed records and documents of Kachina Fashions, Inc.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 12, 1978, in the Northern District of California, the defendant JACK DIFILIPPI, while under oath as a witness before the special federal

grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath, the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Did you discuss with Joe, Sr. the fact that Michael Dorn had visited Tucson:

A. And visited Tucson.

Q. Michael Dorn, the follow you had breakfast with yesterday, did you discuss with Joe Bonanno, Sr.?

A. Michael Dorn went to Tucson?

Q. Yes.

A. Come on now, he couldn't even walk. The guy is in bad shape, and you say that he went to Tucson?

Q. Did you discuss the fact—

A. No, I did not discuss—

* * *

Q. You did not discuss with Joe Bonanno, Sr. the fact that Michael Dorn was in Tucson over the weekend?

A. No, I did not, because I didn't know.

which answers were false, as the defendant then and there well knew, in that, on or about October 8, 1978, defendant JACK DIFILIPPI did discuss with defendant

JOSEPH C. BONANNO, SR. the fact that Michael Dorn recently had come to Tucson, Arizona and had seen defendant JOSEPH C. BONANNO, SR., at that time,

All in violation of Title 18, United States Code, Section 1623.

COUNT THREE: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI, while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Did anybody make a phone call during the time that you were all together at dinner at the Velvet Turtle?

A. I got up to make a phone call.

Q. You did?

A. Yes.

Q. Who did you call?

A. You want to know? It is important to you?

Q. Yes.

A. I called my Uncle Joe, Joe Bonanno, Sr.

Q. What did you discuss with him?

A. I didn't discuss the Grand Jury.

Q. Did you tell him what you testified to in the Grand Jury?

A. I don't think I talked to him about those things at all, not because I couldn't tell him; it is not the issue. Right now I do believe that he is under doctor's care and I don't want to upset anybody.

Q. Did you tell him what Mike Dorn testified to in the Grand Jury?

A. No.

Q. Did you tell him what Karen Bonanno testified to in the Grand Jury?

A. No.

which answers were false, as the defendant then and there well knew, in that during the phone conversation from the Velvet Turtle Restaurant to the defendant JOSEPH C. BONANNO, SR., about which the defendant JACK DIFILIPPI testified, he told the defendant JOSEPH C. BONANNO, SR. what he had been asked

and what he had said in the grand jury on October 12, 1978, what Michael Dorn had been asked and what he believed Michael Dorn had said in the grand jury on October 12, 1978, and what Karen Bonanno had said and done in the grand jury on October 12, 1978,

All in violation of Title 18, United States Code, Section 1623.

COUNT FOUR: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Well, have you talked to Joe Bonanno, Sr. at all since your last appearance before the Grand Jury; have you discussed with him the subject of this Grand Jury investigation at all?

A. No . . .

* * *

Q. You say you have not discussed the Grand Jury testimony with him at all?

A. Ever.

Q. Never discussed it?

A. Never.

which answers were false, as the defendant then and there well knew, in that, on or about October 13, 1978, defendant JACK DIFILIPPI again did discuss with defendant JOSEPH C. BONANNO, SR. the proceedings before the grand jury on October 12, 1978,

All in violation of Title 18, United States Code, Section 1623.

COUNT FIVE: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following question and made the following answer:

Q. You have never discussed with him [Joseph C. Bonanno, Sr.] the subject of what Michael [Dorn] could or should say or would say to this Grand Jury?

A. No.

which answer was false, as the defendant then and there well knew, in that, on October 12, 1978, and again on October 13, 1978, defendant JACK DIFILIPPI did discuss with defendant JOSEPH C. BONANNO, SR. what testimony they wanted Michael Dorn to give to the grand jury concerning his visit to Tucson and concerning loans he made to Kachina Fashions, Inc.,

All in violation of Title 18, United States Code, Section 1623.

COUNT SIX: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 26, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following question and made the following answer:

Q. Has he [Joseph C. Bonanno, Sr.] ever asked you to talk to Michael Dorn about his testimony?

A. No.

which answer was false, as the defendant then and there well knew, in that in a conversation on October 12, 1978, JOSEPH C. BONANNO, SR. did ask the defendant JACK DIFILIPPI to tell Michael Dorn how he should testify about his trip to Tucson and about his loans to Kachina Fashions, Inc.,

All in violation of Title 18, United States Code, Section 1623.

COUNT SEVEN: (18 U.S.C. §1623)

The Grand Jury Further Charges: THAT

1. Paragraph 1 of Count One is hereby realleged and incorporated as if fully set forth herein.

2. On or about October 12, 1978, in the Northern District of California, the defendant JACK DIFILIPPI while under oath as a witness before the special federal grand jury in the foregoing investigation, knowingly, willfully, and unlawfully made a false material declaration, in that while under oath the defendant JACK DIFILIPPI was asked the following questions and made the following answers:

Q. Have you ever participated with Mr. Bonanno, Sr., now, in any of his financial dealings?

A. No.

Q. Either have you lended him any assistance in—

A. No.

Q. —scouting out a deal or helped raise money for him?

A. No.

Q. You never had any dealings with him at all?

A. No, I never did, I can do myself.

Q. How about with Bill or Joe?

A. No, I never have had.

Q. Your testimony is you have never engaged in any business transactions with any of them?

A. Never.

which answers were false, as the defendant then and there well knew, in that, for the past several years, defendant JACK DIFILIPPI has represented the defendant JOSEPH C. BONANNO, SR., Salvatore "Bill" Bonanno, and Joseph C. Bonanno, Jr. in various business dealings,

All in violation of Title 18, United States Code, Section 1623.

A TRUE BILL.

FOREMAN

/s/ G. William Hunter
G. WILLIAM HUNTER
United States Attorney